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No. 04-9728

Supreme Court, U.S.
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In The

# Supreme Court of the United States

DONALD CURTIS SAMSON,

*Petitioner,*

v.

CALIFORNIA,

*Respondent.*

**On Writ Of Certiorari**
**To The Court Of Appeal**
**Of The State Of California**

## BRIEF OF *AMICUS CURIAE* COUNTY OF LOS ANGELES COUNTY SUPPORTING RESPONDENT

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

With a population of ten million residents, Los Angeles County is the largest local governmental entity in the nation. The County is home to nearly 36,000 state parolees, some 47,000 adult probationers, and 12,000 juvenile probationers. In addition, California's 70% recidivism rate for parolees is the highest in the nation, accounting for an estimated 8,000 prosecutions for serious crimes in Los Angeles County each year.

Probationers and parolees account for thousands of additional criminal cases in the County annually. The County faces serious logistical hurdles in protecting its citizenry and in combating parolee recidivism. One of the major tools used in this battle is the random surprise parole search, which is currently authorized by state statute. California *Penal Code*, § 3067. In order to be effective, parole supervision must include such "surprise searches" which are not premised on probable cause or even reasonable suspicion. Only then can the County, in general, and law enforcement, in particular, be assured that the parolee is abstaining from criminal conduct and otherwise abiding by the terms and conditions of his or her release.

As an express condition of their parole and/or probation, most – but not all – of Los Angeles County's 95,000 convicted offenders voluntarily provide ***advance consent***

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[1] No counsel for a party authored this brief, in whole or in part, and no person other than the *amicus curiae*, its members or their counsel made a monetary contribution to the preparation or submission of this brief. In addition, all parties have consented to the filing of the instant brief.

to a partial waiver of their Fourth Amendment rights in which they agree to submit their persons, vehicles, residences and effects to warrantless, suspicionless searches and seizures by any peace officer.

The advance consent condition contained in the standard probation and parole agreements constitute a major tool used to effectuate Los Angeles County's dual goal of successfully re-integrating individuals into society and protecting the community. As such, Los Angeles County has a direct interest in the resolution of the issue before the Court in this case.

## SUMMARY OF ARGUMENT

In California, most – but not all – convicted offenders provide voluntary ***advance consent*** to a partial waiver of their Fourth Amendment rights in which they agree to submit their persons, vehicles, residences and effects to warrantless, suspicionless searches and seizures by any peace officer. Indeed, this common provision has been codified in *Penal Code*, § 3067.

Although all parolees are subject to this search condition under California law, not all prisoners eligible for parole agree to provide such advance consent on their release form. See Cal. Code Regs., tit. 15, § 2512. Instead, some inmates choose to reject the terms of parole, and suffer an automatic revocation which requires that the

inmate serve the balance of the parole period in custody. *Penal Code*, § 3060.5.[2]

If even a small segment of the prison population is making the conscious choice that time in custody is better than parole conditions on the outside, then those who agree to abide by the terms and provide such advance consent are also making a choice. If this choice is a voluntary one, then the consent given is valid.

Based on this ***advance consent*** – in which the parolee agrees to submit to a warrantless, suspicionless search and seizure by any peace officer – the inmate has no existing, legitimate, subjective or objective expectation of remaining free from police intrusions, so long as the search is accomplished in a reasonable manner. Thus, neither reasonable suspicion nor police foreknowledge of the search condition is required for otherwise-reasonable police intrusions, since the parolee has provided voluntary advance consent to submit to such searches.

Simply stated, if one consents to waive one's right to be free from what would otherwise be an unconstitutional search or seizure, there can be no constitutional violation. In other words, ***police cannot infringe upon a right which has been waived***.

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[2] While it might seem to defy reason that an inmate would not sign a release agreement if it meant an end to incarceration, some inmates take the long view that they do not wish to be subject to search and seizure conditions, housing restrictions, or reporting requirements. Others fear that elevated supervision could result in the discovery of other criminality, which might implicate "strike" priors.

## ARGUMENT

### I. A CALIFORNIA INMATE MAY ELECT TO SERVE HIS PAROLE PERIOD EITHER: (1) IN CUSTODY; OR (2) OUT OF CUSTODY AND SUBJECT TO THE CONDITION THAT THE INMATE PROVIDE ADVANCE CONSENT TO SUBMIT TO WARRANTLESS, SUSPICIONLESS SEARCHES AND SEIZURES

Parolee recidivism is both a very real concern and a well-documented problem. With over 100,000 adults on supervised parole, California faces serious logistical hurdles administering the twin concerns of protecting society and re-integrating inmates back into society.

To combat these problems, California has established a parole system whereby inmates may be released from physical custody, provided the inmates abide by any number of terms and conditions. During this time, however, the parolee is not a "free man." Instead, the parolee remains in the legal custody of the Department of Corrections while living in the community. *Penal Code*, § 3056. While serving out the balance of his or her term, the parolee must comply with all the terms and conditions of parole. *Penal Code*, § 3060.

Common parole terms include mandatory narcotics testing, prohibitions against violating any law, restrictions against associating with other felons or gang members, and periodic meetings with parole agents. In addition, under California law, all parolees are subject to search and seizure by any law enforcement officers, with or without reasonable suspicion. *Penal Code*, § 3067.

While it is true that all parolees are subject to warrantless, suspicionless searches, that does not mean that

all parolees agree to abide by these terms. Rather, inmates are faced with the hard choice of deciding whether they wish to be released from physical custody subject to increased monitoring and a diminished expectation of privacy, or to complete the balance of their parole terms in custody.

Faced with this difficult decision, most inmates agree to the terms of parole (including a prospective partial waiver of their Fourth Amendment right to be free from warrantless, suspicionless searches) and elect to be released from physical custody. However, some inmates choose to refuse the terms of the parole grant and elect to serve out the remainder of the parole term in physical custody. See *Penal Code*, § 3060.5.

This decision is made for a variety of reasons. Some inmates refuse to abide by housing restrictions or restrictions against associating with known felons or fellow gang members. Others choose to complete their parole in custody to prevent more detailed scrutiny that would occur if they were on parole.

If even a small segment of the prison population is making the conscious choice that time in custody is better than parole conditions on the outside, then those who agree to abide by the terms and provide such advance consent are also making a choice. If this choice is a voluntary one, then the consent given is valid.[3]

[3] Under the terms of *Penal Code*, § 3067, subdivision (b), no inmate may be released from custody unless he agrees to the search provision. This is done to prevent inmates from absconding until after their first meeting with a parole agent. Accordingly, by statute, Samson could not have been a § 2067 parolee without having signed the parole agreement.

In *United States v. Knights*, 534 U.S. 112 (2001), this Court held that a parole search "requires ***no more than*** reasonable suspicion to conduct a search of this probationer's house." *Id.* at 121. However, this Court did not reach the question of whether a search could be justified by ***less than*** reasonable suspicion. Likewise, this Court did not address the question of whether such a search can be justified based on advance consent. See *id.* at 118.

For the reasons set forth herein, *amicus curiae* submits that where a parolee provides voluntary ***advance consent*** to submit to a warrantless, suspicionless search and seizure by any peace officer, the parolee has no existing, legitimate, subjective or objective expectation of remaining free from police intrusions, so long as the search is accomplished in a reasonable manner. Accordingly, this Court should hold that neither reasonable suspicion nor police foreknowledge of search condition is required for otherwise-reasonable police intrusions, since the parolee has voluntarily consented to waive his or her right to such searches.

## II. A PAROLEE'S VOLUNTARY ADVANCE CONSENT TO SUBMIT TO WARRANTLESS, SUSPICIONLESS SEARCHES IS VALID, PROPER, AND BINDING

### A. Advance Consent Agreements Have Been Repeatedly Upheld As Constitutional

Although the Fourth Amendment generally requires that a search be authorized by a judicial warrant based upon probable cause, it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is

conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). This consent must be voluntary to be constitutionally valid. *Id.* at 222; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

For Fourth Amendment purposes, an individual consent to search may be deemed voluntary even if it is motivated by the subject's belief that refusal to consent will result in concrete disadvantages. See *Schneckloth*, 412 U.S. at 228.

Moreover, an individual may authorize advance consent to a search. See *Zap v. United States*, 328 U.S. 624, 627 (1946).[4] Such an advance consent term, sometimes known as a "Fourth Waiver," is a common term of probation in California. See *United States v. Ooley*, 116 F.3d 370, 371 (9th Cir. 1997).

The California Supreme Court has held that individuals convicted of crimes may be required to consent to future warrantless searches as a condition of probation, and that a consent to search obtained in that manner is valid and enforceable. See, e.g., *People v. Bravo*, 43 Cal.3d 600, 605-611, 238 Cal.Rptr. 282 (1987); *People v. Mason*, 5 Cal.3d 759, 764-766, 97 Cal.Rptr. 302 (1971), disapproved on other grounds in *People v. Lent*, 15 Cal.3d 481, 486, n. 6, 124 Cal.Rptr. 905 (1975).

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[4] The judgment in *Zap* was vacated on other grounds. See *Zap v. United States*, 330 U.S. 800 (1947). This Court, however, has continued to treat *Zap* as good law and has cited it as authority for the proposition that a search based on consent is lawful notwithstanding the absence of a judicial warrant and/or probable cause. See *Schneckloth*, 412 U.S. at 219; *Katz v. United States*, 389 U.S. 347, 358, n. 22 (1967); *Texas v. Brown*, 460 U.S. 730, 736 (1983) (plurality opinion).

The rule that an individual may voluntarily provide advance consent to a search that might otherwise be prohibited by the Fourth Amendment accords with the general principle that an individual may, within broad limits, enter into agreements with the government under which he or she forgoes the exercise of constitutional rights in return for a promise of favorable treatment. Such agreements are not rendered unenforceable simply because the waiver of rights is prompted by the desire to obtain a benefit or avoid a burden, or because the individual is forced to choose between two unattractive alternatives.

For example, in the criminal context, it is beyond dispute that a negotiated criminal plea agreement may be valid and enforceable even where it is motivated by the defendant's belief that he or she is likely to face greater punishment if the case proceeds to trial. See *Brady v. United States*, 397 U.S. 742, 755 (1970) ("plea of not guilty is not invalid merely because entered to avoid the possibility of a death penalty.").

### B. Since Parole Is A Privilege And Not A Right, Requiring Advance Consent Is Not An Unconstitutional Condition

Further support for advance consent conditions can be found in the legislative history surrounding Assembly Bill 2284, which later became *Penal Code*, § 3067, aptly demonstrates that the statute was intended to represent a consent condition, stating:

> "Courts have interpreted parole to be a right under California law. Because parole is a right, courts reason that the condition of parole that subjects the parolee to search and seizure by any peace officer is largely ineffective. This is true because the state cannot force an individual to waive one right (Fourth Amendment) in exchange for another (parole rights). Because convicted felons have no right under the law to be granted probation, the courts have allowed the state to require a waiver of Fourth Amendment rights in exchange for the privilege of being released on probation. The irony is this logic dictates that parolees should be much more closely supervised than probationers and should therefore be subject to even stricter search conditions." Committee Report for 1995 California Assembly Bill 2284, 1995-1996 Regular Session.

To combat this problem, the bill, as passed by the assembly, specifically provided as follows:

> "AS PASSED BY THE ASSEMBLY, this bill stated that: 1) Legislative findings and declarations that parole is a privilege, not a right. Therefore, it is the intent of the Legislature that for any inmate who committed a crime on or after January 1, 1997 parole is to be granted only on a conditional basis. 2) Legislative findings and declarations that all parolees be subject to intense supervision and surveillance by law enforcement officers of this state." *Id.*

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" right whose

waiver is at issue. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

In contrast, the requirement that parolees provide advance consent to a search directly furthers the state's interest in the effective administration of the parole system. Indeed, in the context of probation cases, the California Supreme Court has explained that, as a matter of state law, "[a] condition of probation is invalid if it (1) has no relationship to the crime of which the defendant is convicted, (2) relates to conduct that is not itself criminal, or (3) requires or forbids conduct that is not reasonably related to future criminality." *Mason*, 5 Cal.3d at 764 (advance consent term constitutional since it is "reasonably related to the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses.").

In this case, as in *Mason*, Samson – by virtue of his status as a parolee – presented a heightened risk of committing further criminal or other antisocial acts, thereby justifying close monitoring and supervision. See *Griffin*, 483 U.S. at 880.

Since the purpose of conditional release is to assist the parolee's reintegration into the community, while minimizing the threat to the public safety and welfare that the release may entail, a search designed to assess the parolee's compliance with the conditions of his or her release is reasonably related to the benefit offered by the state.

Likewise, the parolee's advance consent is not rendered invalid simply because the alternative is imprisonment, especially since parole is considered a privilege and not a right and is to be granted only on a conditional basis. Moreover, as stated above, this Court has repeatedly

recognized that a guilty plea is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. See *Brady*, 397 U.S. at 755.

As such, California's advance consent condition – as codified by *Penal Code*, § 3067 – passes constitutional muster pursuant to *Dolan v. City of Tigard*, 512 U.S. at 385.

### C. Public Policy Supports Advance Consent Conditions

Finally, public policy supports the maintenance of warrantless, suspicionless searches. As this Court noted in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), "it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law." *Id.* at 880. Thus, while it is true that the State is concerned about a parolee's reintegration into society, it also has the other concern, quite justified, that a parolee will be more likely to engage in criminal conduct than an ordinary member of the community. *Knights*, 534 U.S. at 120-121.

As the California Court of Appeal has noted, a "parolee constitutes a calculated risk to the safety and security of the community" and "requires his close supervision by his parole officer." *People v. Nicholson*, 123 Cal.App.4th 823, 830, 20 Cal.Rptr.3d 476 (2004). Supervision during this transition is crucial to the State's interest in protecting the community. In California, the ability of law enforcement to conduct random parole sweeps is crucial to its ability to monitor parolees more closely and to ensure that they are abiding by the terms of their probation. This,

in turn, helps to deter the parolees from engaging in additional criminal conduct, thereby protecting society.

Moreover, by allowing parolees the opportunity to consent to such terms, the long-term interests of the class may be furthered. As the California Supreme Court observed in *Bravo*, if

> "A probationer's waiver of Fourth Amendment rights were either impermissible or limited to searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose." *Bravo,* 43 Cal.3d at 609.

Finally, if a contrary view were given currency, it would have a detrimental impact both on California's ability to manage effectively its parole system and on a sentencing judge's options. Even worse, it would render the language of *Penal Code*, § 3067 a nullity and would serve to re-write the manifest intent of the parties which executed the advance consent provisions as an express condition of early release from custody.

## III. THE EFFECT OF A PAROLEE'S VOLUNTARY ADVANCE CONSENT TO SUBMIT TO WARRANTLESS, SUSPICIONLESS SEARCHES

### A. A Parole Or Probation Search Premised On Prospective Consent Does Not Require Independent Justification

"The capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). "The applicability of the Fourth Amendment turns on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Hudson v. Palmer*, 468 U.S. 517, 525 (1984) (citation and internal punctuation omitted).

In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court said that Fourth Amendment "reasonableness" has four components. Courts evaluating a search or seizure "must consider [1] the scope of the particular intrusion, [2] the manner in which it is conducted, [3] the justification for initiating it, and [4] the place in which it is conducted." *Id.* at 559.

A parole or probation condition of suspicionless search and seizure addresses only the third of these factors – justification. The need for any independent, objective justification for a search or seizure (normally some level of suspicion, or consent or a warrant) has been extinguished, for the duration of parole or probation.

This is not a complete elimination of the person's Fourth Amendment protection, for officers' actions must still be reasonable under the three remaining factors. It

would not be reasonable, for example, for officers to show up at a parolee's or probationer's home every night at 3:00 a.m. to conduct a harassing search. The limitations of *Bell* factors 1, 2 and 4 remain as constraints on a searching officer's authority to conduct a search or seizure, even of a parolee or probationer, thereby preventing any justified search from being conducted in an oppressive manner. "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968).

But *whenever* a parolee or probationer who has provided advance consent is subjected to police activity that would otherwise require the objective justification necessary to search or seize a non-parolee and non-probationer, *Bell* factor 3 simply is not in issue. Elimination of the need to prove an independent justification for a parole or probation search or seizure is the extent to which the Fourth Amendment rights of the parolee or probationer have been "significantly diminished." *Knights*, 534 U.S. at 120.

### B. Since No Independent Justification Is Required For An Advance Consent Search, No Justification "Balancing" Is Required

Both the California Supreme Court (see, e.g., *People v. Sanders*, 31 Cal.4th 318, 333, 2 Cal.Rptr.3d 630 (2003)) and the United States Court of Appeals for the Ninth Circuit (see, e.g., *Moreno v. Baca*, ___ F.3d ___, 2005 U.S. App. LEXIS 26906 (9th Cir. Dec. 9, 2005) (en banc)) approach parole and probation searches as if they were

subject to the normal Fourth Amendment balancing test, under which courts evaluate justification for a search or seizure by weighing the degree of intrusion upon protected individual interests against the need to promote legitimate governmental interests. *Illinois v. Lidster*, 540 U.S. 419, 427 (2004). This approach – applied by the decisions upon which the judgment against petitioner was based – is both incorrect and unnecessary in the context of parole and probation searches and seizures. To prevent further misunderstanding, this Court should explain the proper analysis.

If the need for independent justification has been lawfully dispensed with, as in parole and probation searches and seizures, conducting a balancing test to assess justification is quite beside the point. The balancing test is appropriate only when independent justification is in issue – namely, when the person contesting a search or seizure can establish that the police conduct infringed his or her own personal, reasonable expectation of remaining free from such intrusions.

Instead of evaluating justification through a balancing exercise, courts should confine their evaluations of parole and probation searches and seizures to a consideration of whether officers exceeded the lawful scope of the condition, or acted in an unreasonable manner in carrying out a search or seizure for which no separate justification is required to be proven.

Simply stated, because a probationer or parolee provides voluntary advance consent to the search, he or she has no right to be free from warrantless, suspicionless searches. And, consequently, there is no constitutional infringement to be remedied by way of either the exclusionary rule in the

criminal context or a suit pursuant to 42 U.S.C. § 1983 in the civil context.

Accordingly, this is not a situation wherein law enforcement is attempting to "retroactively justify" a search. Rather, in the absence of an infringement of some existing and legitimate right, there is nothing to justify.

### C. An Inmate's Advance Consent Eliminates His Or Her Ability To State A Claim That Police Detention And Search Violated Legitimate Expectations Of Liberty And Privacy

Petitioner's case is before the Court because he sought to invoke the Fourth Amendment exclusionary rule. Unfortunately, courts often treat such motions to suppress evidence as inevitably and immediately requiring an examination of the officer's asserted justification for the actions that produced the contested evidence, "with barely any mention of the threshold substantive question of whether the search violated [the movant's] own Fourth Amendment rights. . . ." *Rakas v. Illinois*, 439 U.S. 128, 139, n. 7 (1978).

Consideration of that necessary threshold question in the case of parolees and probationers who are subject to a suspicionless search condition quickly and appropriately concludes the exclusionary issue, for unless there are issues as to place, scope or manner of execution, the person's own Fourth Amendment rights will not have been violated, and he will not be entitled to invoke the rule.

For example, in *Rakas*, what obviated any inquiry as to the justification for the vehicle search that produced the evidence that incriminated Frank Rakas, a non-owner

passenger, was the fact that the search did not invade any personal expectation of privacy he could legitimately claim. Therefore, "it was unnecessary to decide whether the search of the car might have violated the rights secured to someone else by the Fourth and Fourteenth Amendments. . . ." *Id.* at 150. Likewise, since the search of petitioner did not invade any personal expectation of privacy he could legitimately claim, it is unnecessary to decide whether Officer Rohleder's conduct would have violated the constitutional rights of a non-parolee.

By now, "It has long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search or seizure." *United States v. Padilla*, 508 U.S. 77, 81 (1993). But how can a parolee or probationer who knows he is subject to suspicionless search and seizure by any officer he may confront reasonably maintain that he nevertheless had a subjective expectation that he would not be searched? And how can he justifiably contend that society should find it objectively reasonable for him to do so?

Logically, he cannot. The entire point of the search condition is to authorize intrusions that would otherwise require independent justification, thus depriving the parolee or probationer of the capacity to claim the protection of that particular ingredient of Fourth Amendment reasonableness.

This Court has repeatedly said that reviewing courts should not reflexively order suppression of evidence, merely because police search or seizure activity might not be objectively justifiable in the abstract. *Arizona v. Evans*,

514 U.S. 1, 14 (1995); *Illinois v. Krull*, 490 U.S. 340, 353 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 333, n. 3 (1985); *United States v. Leon*, 468 U.S. 897, 906 (1984). And the Court has repeatedly applied this principle where the proponent of a motion to exclude evidence is unable to establish that challenged police conduct violated his personal, existing, legitimate rights under the Fourth Amendment. *Alderman v. United States*, 394 U.S. 165, 174 (1969); *Brown v. United States*, 411 U.S. 223, 230 (1973); *Rakas v. Illinois*, 439 U.S. at 148-149; *United States v. Salvucci*, 448 U.S. 83, 95 (1980); *United States v. Padilla*, 508 U.S. at 81; *Minnesota v. Carter*, 525 U.S. 83, 90-91 (1998).

Applying these teachings to the case of a parolee or probationer who is lawfully subject to suspicionless search and seizure – and who therefore cannot establish a personal, existing, legitimate expectation of remaining free from such intrusions – resolves the issue in this case, without resort to irrelevant inquiries as to the officer's foreknowledge of the condition, or the existence of particularized suspicion.

The issue on appeal, therefore, is ***not*** whether police can engage in unreasonable searches and seizures (they cannot), nor whether after-acquired evidence can retroactively justify an action already taken (it cannot). The issue presented is whether a parolee has a Fourth Amendment right not to be detained and searched in direct contravention to his previous knowing and voluntary grant of consent.

### D. The Existence And Scope Of A Parolee's Or Probationer's Fourth Amendment Protection Cannot Be Contingent Upon The Subjective Suspicions Or Knowledge Of The Particular Officer Involved

Equal protection of the laws is not possible if the degree to which a person is protected by the Constitution is made to depend upon the subjective state of mind of the individual police officer the person chances to encounter. The Court has consistently rejected attempts to tie claims of constitutional error to the motives, intents, or other states of mind of particular police officers. *Devenpeck v. Alford*, 543 U.S. 146, ___, 125 S.Ct. 588, 593-594 (2004) (officer's subjective analysis of probable cause for arrest not determinative); *Whren v. United States*, 517 U.S. 806, 812-813 (1996) (officer's subjective intent not controlling as to justification for detention); *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (*per curiam*) (same); *Scott v. United States*, 436 U.S. 128, 138 (1978) (officer's subjective state of mind not dispositive); *Maryland v. Macon*, 472 U.S. 463, 470-471 (1985) (same); *Horton v. California*, 496 U.S. 128, 138 (1990) (objective standards control, "rather than standards that depend upon the subjective state of mind of the officer"); *United States v. Leon*, 468 U.S. at 922, n. 23 (exploring officers' mindsets to assess constitutional claims "would produce a grave and fruitless misallocation of judicial resources"); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (officer's subjective plan to arrest does not constitute *Miranda* "custody"); *Stansbury v. California*, 511 U.S. 318, 324 (1994) (officer's subjective focus of suspicion "does not bear upon the question whether the individual is in custody for purposes of *Miranda*"); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (determination of *Miranda* "interrogation" not dependent on "the intent of

the police"); *United States v. Robinson*, 414 U.S. 218, 236 (1973) (officer's subjective lack of fear irrelevant to validity of search incident to arrest).

These and other cases stand for the proposition that objective facts, rather than subjective knowledge or suspicions, should be considered in deciding the threshold question of whether or not a person's own legitimate rights could potentially be violated by the contested police conduct. If it appears from the objective facts that no violation could occur, the constitutional inquiry is ended.

Petitioner Samson was on a valid parole condition requiring submission to warrantless, suspicionless search and seizure. The facts of record do not indicate that his search was conducted beyond the scope of this condition, or in an unreasonable manner. All petitioner challenges is the lack of objective justification, which he argues should require at least reasonable suspicion of wrongdoing.

But petitioner's parole condition eliminated any separate requirement of individualized justification; therefore, while petitioner could reasonably expect that any search or seizure of him would be confined to a proper scope and be executed in a reasonable manner, he could no longer reasonably expect to remain free from suspicionless searches and seizures. The officer's personal motive for searching, or his foreknowledge or lack of foreknowledge of the parole condition, could not invest petitioner with protection he no longer enjoyed.

Can a car thief acquire a violable right not to have his victim's automobile searched merely because the officer who stops him is initially unaware that the car is stolen? Of course not. *Rakas v. Illinois*, 439 U.S. at 141, n. 9. Can a burglar or drug dealer acquire a violable right against

warrantless entry of another's home, merely because the officer who entered to arrest him may not have been aware of his status? Surely not. *Minnesota v. Carter*, 525 U.S. at 90-91. Can a parolee or probationer acquire a violable right not to be stopped and searched on the street, merely because the officer may not have realized the person was subject to suspicionless search and seizure? It makes no sense to hold that he can. Police cannot violate a nonexistent right.

Both *People v. Sanders*, 31 Cal.4th at 335, and *Moreno v. Baca, supra*, slip opinion at *3-*5, erroneously concluded that a police officer's lack of foreknowledge of the parolee's or probationer's condition somehow makes unreasonable a search that would be valid if conducted by another officer who happened to be aware of the condition. Both decisions spoke of the impermissibility of attempting "retroactive justification" of a parole or probation search or seizure by the after-acquired knowledge that the person was subject to suspicionless search and seizure.

But as discussed above, there is no issue of justification with respect to parole and probation searches, retroactive or otherwise, so these rulings – which together currently control every parole and probation search in California – are misdirected, and should be corrected. The Court should affirm the ruling below to the effect that no level of suspicion is required in order to conduct a reasonable search or seizure of one who is subject to a valid condition of parole or probation allowing such actions. And the Court should make clear that police lack of foreknowledge of the parole or probationary status of an individual does not revive a temporarily extinguished right.

## CONCLUSION

Where a parolee provides voluntary ***advance consent*** to submit to a warrantless, suspicionless search and seizure by any peace officer, the parolee has no existing, legitimate, subjective or objective expectation of remaining free from police intrusions, so long as the search is accomplished in a reasonable manner. Accordingly, this Court should hold that neither reasonable suspicion nor police foreknowledge of a search condition is required for otherwise-reasonable police intrusions, since the parolee already has provided ***advance consent*** to submit to such searches.

Respectfully submitted,

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